Koay Chiew Leong (t/a Leong & Co) v United Engineers (M) Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S2–23–67 OF 1994
KAMALANATHAN RATNAM J
25 FEBRUARY 1999

Limitation *— Postponement of limitation period — Set-off and counterclaim — Whether time barred — Plaintiff claimed monies due pursuant to sub-contracts — Defendant alleged overpayment to plaintiff — Defendant prayed for set-off of sum overpaid and advanced same sum as counterclaim — Whether defendant's claim by way of counterclaim and set-off protected by s 31 of the Limitation Act 1953*

By way of two contracts dated 16 June 1981 and 5 August 1981, the defendant sub-contracted two projects to the plaintiff. The plaintiff commenced action against the defendant in 1986, claiming for monies due pursuant to the sub-contracts. The defence was that there had been an overpayment to the plaintiff, and the defence thus prayed for a set-off of the sum overpaid. However, after pleading the set-off, the defence also advanced the same amount as a counterclaim against the plaintiff. The set-off and counterclaim were pleaded in 1997. The plaintiff raised a preliminary issue that the defendant's counterclaim was barred by limitation. The defendant argued that it was saved by s 31 of the Limitation Act 1953 ('the Act').

Held, the counterclaim was barred by limitation:

If a set-off or counterclaim arises out of the same transaction, it needs to be properly described as a defence and cannot, by any means, be caught by the Act. Whether the set-off is a legal or an equitable set-off, so long as such a set-off relates, pro tanto, as a pure defence, then s 31 of the Act will provide the protective cover against a plea of limitation. In so far as the counterclaim was concerned, it followed therefore, that the same was caught by limitation (see p 395B).

[Bahasa Malaysia summary

Melalui dua kontrak bertarikh 16 Jun 1981 dan 5 Ogos 1981, defendan telah memberikan subkontrak dua projek kepada plaintif. Plaintif telah memulakan tindakan terhadap defendan pada tahun 1986, menuntut wang yang harus dibayar menurut subkontrak tersebut. Pembelaan yang dikemukakan adalah bahawa terdapat bayaran berlebihan kepada plaintif, dan justeru itu pihak pembelaan meminta supaya jumlah berlebihan yang dibayar ditolak. Namun demikian, setelah memplidkan tolakan, pihak pembelaan juga mengemukakan amaun yang sama sebagai tuntutan balas terhadap plaintif. Tolakan dan tuntutan balas diplidkan pada tahun 1997. Plaintif membangkitkan isu permulaan bahawa tuntutan balas dihalang oleh had masa. Defendan berhujah bahawa ia dilindungi oleh s 31 Akta Had Masa 1953 ('Akta tersebut').

Diputuskan, tuntutan balas dihalang oleh had masa:

Sekiranya tolakan atau tuntutan balas timbul daripada transaksi yang sama, ia perlu disifatkan sebagai pembelaan dan tidak boleh, melalui apa-apa cara pun, diperangkap oleh Akta tersebut. Sama ada tolakan adalah tolakan sah atau ekuiti, asalkan tolakan sedemikian pro tanto berkaitan sebagai pembelaan yang tulen, maka s 31 Akta tersebut akan memberikan perlindungan terhadap hujah had masa. Setakat mana tuntutan balas adalah berkenaan, ini bermakna bahawa ianya dihalang oleh had masa (lihat ms 395B).]

Notes

For cases on postponement of limitation period generally, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1889–1892.

Cases referred to

Bank Bumiputra (M) Bhd v Sal Enterprise Sdn Bhd & Ors [1994] 3 CLJ 289 (refd)

Henriksens Rederi A/S v PHZ Rolimpex [1973] 3 All ER 589 (refd)

Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157 (refd)

Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (In liquidation) [1998] 4 MLJ 569 (refd)

Legislation referred to

Limitation Act 1953 s 31

Limitation Act 1939 s 28 [UK]

M Pathmanathan (*Yusuf Khan & Pathmanathan*) for the plaintiff.
GH Khoo (*Skrine & Co*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

This suit has a chequered history. It was originally filed in the High Court at Alor Star as Civil Suit No 23–119–86 and was transferred under the present title to this court on 17 February 1994. However, for reasons not fully nor properly explained, the defence and counterclaim was filed only on 24 January 1997, and a reply and defence to the counterclaim was filed on 9 June 1998.

The defendant herein was employed by Malayan Four Mills Bhd to undertake the construction and completion of two projects, namely:

(i) the workshop and warehouse works; and

(ii) the feedmill complex works.

However, the defendant sub-contracted the said two projects to the plaintiff, by way of two contracts, dated 16 June 1981 and 5 August 1981. The plaintiff claims against the defendant for monies due pursuant to these two sub-contracts, including variations and additional works, and loss and damages amounting to RM7,052,897.84. The defence is that there has been an overpayment to the plaintiff for RM1,887,144.01, and the defence thus prayed for a set-off of this sum. However, after pleading the set-off, the defence also advances this same amount as a counterclaim against the plaintiff.

Issue before the court

By consent, parties agreed that I decide, before the full trial, the plaintiff's defence of limitation to the defendant's counterclaim as a preliminary issue, for convenience and for saving of time and costs.

Findings of the court

For the purposes of determining this issue of limitation, I shall not go into the merits of the defendant's contention of overpayment. It is the plaintiff's case that since the two sub-contracts were signed on 16 August 1981 and 28 December 1982, any claims in respect of these two contracts would have to be made on or before 16 August 1987 and 28 December 1988. Alternatively, it was the plaintiff's case that even if time was to run from the last date the defendant effected payment to the plaintiff, which was on 20 July 1984, the limitation period would have set in on 20 July 1990. Since the defence and counterclaim had only been filed on 24 January 1997, the plaintiff argued that clearly the defence was caught by limitation.

One factor pertinent to this case is that when the plaintiff commenced this action, the defendant's claim against the plaintiff was not time barred.

The defendant, however, argues that it is saved by s 31 of the Limitation Act 1953 ('the Act') which reads:

> For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

Section 31 of the Act is in pari materia with s 28 of the English Limitation Act 1939. Mr Pathmanathan, for the plaintiff, referred me to *Henriksens Rederi A/S v PHZ Rolimpex* [1973] 3 All ER 589, wherein Lord Denning MR held that s 28 only applies to a set-off and counterclaim which arises out of transactions that are separate from that of the plaintiff's claim, so long as they are not time barred at the time when the plaintiff issues his writ. I was therefore urged to apply this decision to the case before me, and to confine and limit the application of s 31 to a set-off and counterclaim arising out of separate transactions, and to hold s 31 inapplicable to a set-off and counterclaim arising out of the same transaction as was in this case. The plaintiff argued that whether the counterclaim of the defendant was existing or not when the writ was filed and served, would make no difference to the plea of limitation because, at the time of pleading the set-off and counterclaim, time bar had already set in.

In trying to rationalize the reason why the Master of the Rolls refused to apply s 28 of the English Act to a claim for set-off or to a counterclaim arising out of the same transaction, Richard Talalla J said in *Bank Bumiputra (M) Bhd v Sal Enterprise Sdn Bhd & Ors* [1994] 3 CLJ 289, at p 290:

> The mischief that s 31 appears to provide against is a plaintiff trying to steal a march on a defendant by waiting till the last moment to file his claim in court, and upon a defendant then seeking to counterclaim, saying that the defendant is time barred. ...

However, in this case, the mischief rule could never even be considered. Whilst the plaintiff had filed this suit in 1986, the defendant pleaded a set-off and counterclaim in 1997, more than ten years later.

Having read the decision of the Court of Appeal in *Henriksens*, I find that the question before the court and the issue decided was that of a general rule in an action for the price of goods sold or for remuneration for services rendered, the defendant could rely on a cross-claim in respect of loss of or damage to the goods or improper or inadequate performance of the services as a true defence, pro tanto, to the plaintiff's claim, rather than as a set-off or counterclaim. It was therefore followed that such a claim could not be defeated by reliance on any period of limitation. The Court of Appeal further went on to hold that the said general rule, however, had no application to a claim for freight. A claim by a charterer for loss of or damage to cargo, could not be relied on as a defence to a claim for freight but had to be the subject of a cross-action. Therefore, as the time limit of one year imposed by the charterparty for the charterers' claim had expired, the claim failed.

As to the interpretation given to Lord Denning's views on s 28, which the plaintiff has held to be the ratio, it is clear to my mind that what was expressed by the Master of the Rolls was mere dicta. Even so, his Lordship had made it very clear that whilst he was of the view that s 28 could not be raised where a claim to set-off or counterclaim arises out of the same transaction, he was quick to add at p 594:

> It can be raised, as I will soon show, as matter of defence, either legal or equitable, so as to reduce or extinguish the claim; and, being matter of defence, it is not subject to a time bar. Such is the law in the United States, where a cross-claim arising out of the same transaction is described as a right of recoupment. It has been held by the Supreme Court (*Bull v United States* (1935) 295 US 247 at p 262) that:
>
> > 'recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitation so long as the main action itself is timely.'

It is therefore my judgment that if a set-off or counterclaim arises out of the same transaction, it needs to be properly described as a defence, and which cannot by any means, be caught by the Act. I am fortified in holding this view because the Act does not define 'set-off' or a 'counterclaim'. It merely refers to 'any claim by way of set-off or counterclaim'. It is precisely with

this in view that s 31 provides that such a set-off or counterclaim will also be deemed to have its limitation period to run with the main cause of action, so long as such a set-off or counterclaim is raised as a pure defence.

One other point I have to consider. In *Henriksens*, Lord Denning MR took the view that in s 28 of the English Act, the word 'set-off' meant only a set-off permitted by the statutes, and that it is not applicable to equitable set-off. Unfortunate for him, both the other two Law Lords, namely, Cairns LJ and Roskill LJ, disagreed with this view and took the view that s 28 applied to all forms of set-off. Relying on *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157, where Salleh Abas LP said at p 161:

> We have no statutes dealing with a defence of set-off as are available in the United Kingdom. Neither have the United Kingdom statutes on the subject been incorporated in our Civil Law Act 1956, which deals with the reception of English law in this country. Section 3(1) of this Act only enacts that 'the Court shall, in West Malaysia or any part thereof, apply the Common Law of England and the rules of equity as administered in England on the 7th day of April 1956'. Clearly, equitable set-off is included in the expression 'rules of equity' which the court is required to apply under the section. But the legal set-off which is based on statute is in no way included in the expression 'the Common Law of England' which we are required to apply. Thus, there being no Malaysian statutes comparable to the United Kingdom statutes on the subject, we, therefore, hold that only equitable and not legal set-off is part of our law, and consequently the court can only deal with an equitable set-off.

Mr Khoo, for the defence, argued that s 31 therefore must be taken to mean equitable set-off and not legal set-off since there is no Malaysian statutes on set-off. With the greatest of respect, the Federal Court in *Permodalan* was not referred to the existing legal and statutory provisions relating to set-off in Malaysia. In a very recent decision in *Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (In liquidation)* [1998] 4 MLJ 569, Edgar Joseph Jr FCJ said, at p 570:

> Turning from the general to the particular, it is clear law that upon the advent of bankruptcy or liquidation, the rights of contractual set-off are displaced by statutory provisions relating to set-off on insolvency. The applicable legislation relating to set-off on company winding-up is to be found in the statutory provisions governing set-off on bankruptcy. To put it in another way, the statutory provisions governing bankruptcy set-off are incorporated by reference into the provisions relating to company winding-up; specifically, ss 40 and 41 of the Bankruptcy Act, are incorporated by reference to companies by virtue of s 291(2) of the Companies Act. Section 41 of the Bankruptcy Act is, of course, the section which obliges a creditor who engages in mutual dealings with the company and is also its debtor, to set-off the debts and prove only for the balance. More particularly, s 41 says this:
>
> '(1) Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order is made under this Act and any other person proving or claiming to prove a debt under such order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account and no more shall be claimed or paid on either side respectively.

A (2) A person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor notice of an act of bankruptcy committed by the debtor and available against him.'

Clearly, therefore, there are statutory provisions relating to set-off. In any case, whether the set-off is a legal or an equitable set-off, so long as such a set-off relates, pro tanto, as a pure defence, then s 31 of the Act will provide the protective cover against a plea of limitation. In so far as the counterclaim is concerned, it follows therefore, that the same is caught by limitation.

Counterclaim barred by limitation.

C Reported by Jafisah Jaafar

D

E

F

G

H

I